

APPEAL NO. 031218  
FILED JUNE 26, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 8, 2003. The hearing officer determined that the \_\_\_\_\_, compensable injury of the appellant (claimant) includes an iliopsoas strain and lumbar spine injury, but does not include the right leg, right hip, or right arm; that claimant's employer tendered a bona fide offer of employment on November 29, 2002; and that claimant had disability from October 24, 2002, through November 28, 2002, only. Claimant appealed the determinations that the injury does not extend to the right hip, right leg, and right arm; the determinations regarding bona fide offer; and the determination that disability ended on November 28, 2002. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part and reverse and render in part.

We have reviewed the complained-of determinations regarding the scope of the injury and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations in this regard are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant contends the hearing officer erred in determining that his employer tendered a bona fide offer. Claimant asserts that the November 19, 2002, letter did not comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) in that a description of the physical requirements that the position would entail were not listed, and we agree. The letter did state that "tasks" would be assigned and indicated that they would be within his restrictions, however, the letter did not state what the physical requirements would be. Therefore, the letter did not constitute a bona fide offer and the hearing officer erred in determining that the employer tendered a bona fide offer to claimant. See Texas Workers' Compensation Commission Appeal No. 001791, decided September 15, 2000; see *also* Texas Workers' Compensation Commission Appeal No. 012338, decided November 15, 2001.

Claimant contends the hearing officer erred in determining that claimant had disability from October 24 through November 28, 2002, only. The hearing officer determined that claimant did not have disability after November 28, 2002, because there was a bona fide offer. The hearing officer stated that, by virtue of the bona fide offer of employment, claimant is deemed to have earned his preinjury wage beginning November 29, 2002, the seventh day after receipt of the offer, citing Rule 129.6(g). However, Section 410.001(16) states that "disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the

preinjury wage. Rule 129.6(g) concerns “deeming” wages that *would have been paid* to be post injury earnings for the purposes of determining entitlement to temporary income benefits (TIBs). The deemed wages are not wages actually paid to claimant. Deeming the wages for the purposes of Rule 129.6 does not affect whether claimant is able to obtain and retain employment at wages equivalent to the preinjury wage. Therefore, even if there is a bona fide offer that is not accepted by a claimant, this does not mean that a claimant does not have disability. If there is a bona fide offer, then the injured worker’s entitlement to TIBs may be affected, but the injured worker may still have disability because of the inability to obtain and retain employment at wages equivalent to the preinjury wage. See Texas Workers’ Compensation Commission Appeal No. 020436, decided April 17, 2002. See also Texas Workers’ Compensation Commission Appeal No. 002799, decided January 17, 2001. The hearing officer erred in determining that the existence of a bona fide offer means there is no disability. Further, we have already rendered that there was no bona fide offer of employment in this case.

We now address the period of disability. The hearing officer noted that no doctor has released claimant to unrestricted work. The hearing officer determined that claimant did have disability, but limited the period of disability only because the hearing officer thought the existence of a bona fide offer meant there could be no disability beginning on the seventh day after receipt of the offer and after that date. Therefore, given the state of the evidence and the hearing officer’s discussion regarding his findings, we can only conclude that, but for the hearing officer’s above-mentioned legal error regarding bona fide offers and disability, he would have determined that claimant had disability from October 24, 2002, through the date of the hearing. We reverse the hearing officer’s decision that claimant had disability from October 24, 2002, through November 28, 2002, and render a decision that claimant had disability from October 24, 2002, through the date of the hearing.

We affirm that part of the hearing officer’s decision and order that determined that the compensable injury includes an iliopsoas strain and lumbar spine injury, but does not include the right leg, right hip, or right arm. We reverse that part of the hearing officer’s decision and order that determined that the employer made a bona fide offer of employment and we render a decision that the employer did not make a bona fide offer of employment. We reverse that part of the hearing officer’s decision and order that determined that claimant had disability from October 24, 2002, through November 28, 2002, and render a decision that claimant had disability from October 24, 2002, through the date of the hearing.

According to information provided by carrier, the true corporate name of the insurance carrier is **SENTRY INSURANCE A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

**GAIL L. ESTES  
1525 NORTH INTERSTATE 35E SUITE 220  
CARROLLTON, TEXAS 75006.**

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Judy L. S. Barnes  
Appeals Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Margaret L. Turner  
Appeals Judge